

## **REMARKS**

### **Background**

This application was previously finally rejected by the Examiner (April 30, 2004) and appealed by Applicants (July 8, 2004). In response to Applicants' filing of the Appeal Brief (Oct. 11, 2004), the Examiner has now re-opened prosecution and levied a new ground of rejection.

Applicants are amending the pending claims to address certain of the Examiner's rejections; other rejections are traversed.

### **State of the Claims**

Claims 5 and 22 are cancelled by this amendment. Claims 1-4, 6-13, 15-18, and 23 remain pending after entry of the amendments.

### **Information Disclosure Statement**

The Examiner has now considered the Information Disclosure Statement filed Oct. 23, 2001.

### **35 U.S.C. § 112 Rejections**

Claim 22 stands rejected under 35 U.S.C. § 112, first and second paragraphs. While Applicants respectfully disagree with the Examiner's grounds for rejecting Claim 22 under Section 112, in an effort to advance prosecution, Applicants have cancelled Claim 22, without prejudice.

### **35 U.S.C. § 102 Rejections**

1. Claims 1-4, 9, 12, and 16-17 (and cancelled Claim 22) stand rejected under 35 U.S.C. § 102(b) as being anticipated by **Hreschak** (U.S. Design Patent No. 212,070).

The Examiner states that Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides that are not parallel to the axis, restriction of movement to the sides and rear, an engagement span that is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end that is less than 75% of the open width, a vertical taper of less than 45°, and a varying radius of curvature along its length (see Figures 1-4). The Examiner further states that the claim recitation "stackable" does not distinguish over Hreschak because "this was an inherent property of the Hreschak product because it certainly was capable of being stacked, for instance in a random pile." (Page 5)

Although Applicants maintain that the term “stackable,” as used in the previously presented claims, does not encompass the snack pieces described by Hreschak, Applicants have amended all the claims to include that the snack pieces covered are “substantially triangular shaped” and are “nestable.” (Support at p. 7, lines 16-29; and p. 13, lines 13-18, respectively). In particular, Claim 1 now encompasses “a plurality of substantially triangular snack pieces capable of being aligned in a nested arrangement...” Applicants submit that the pieces of Hreschak are not capable of being arranged in such a nested manner. Furthermore, the Examiner admits at pages 7 and 8 that Hreschak does not teach a substantially triangular shape.

Applicants therefore respectfully request withdrawal of the Section 102(b) rejection Claims 1-4, 9, 12, and 16-17 over Hreschak.

2. Claims 1-4, 6-7, 9, 11-13, 15-18 and 23 (and cancelled Claims 5 and 22) stand rejected under 35 U.S.C. § 102(b) as being anticipated by **Smietana** (U.S. Patent No. 4,915,964).

The Examiner states that Smietana teaches a stackable snack piece that restricts dip in at least two directions and that satisfies the other elements of the mentioned claims.

Applicants maintain their prior arguments as to why Smietana does not teach all the elements of Applicants’ claims. In addition, the recitation in Applicants’ claims that the snack pieces be substantially triangular is not taught by Smietana. Indeed, per Smietana’s title and disclosure, the reference is directed to “conically shaped tortilla shells.”

Applicants therefore respectfully request withdrawal of the rejection of Claims 1-4, 6-7, 9, 11-13, 15-18 and 23 over the Smietana.

3. Claims 1-4, 9 and 12 (and cancelled Claim 22) stand rejected under 35 U.S.C. § 102(b) as being anticipated by **Morales** (U.S. Design Patent No. 383,589).

The Examiner asserts that Morales teaches a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a vertical aper between 0 and 45° and an engagement span less than 90% the vertical span.

Applicants maintain their prior arguments traversing the rejection over Morales. In addition, Applicants submit that the present amendments concerning the substantially triangular nature of the snack pieces is not described by Morales.

Applicants therefore request withdrawal of the rejection of Claims 1-4, 9 and 12 over Morales.

4. Claims 1-4, 9 and 12 (and cancelled Claim 22) stand rejected under 35 U.S.C. § 102(e) as being anticipated by **Tirillo** (U.S. Patent No. 5,997,921).

The Examiner asserts that Tirillo teaches a stackable snack piece meeting all the elements of Applicants' pending claims. Applicants reiterate the arguments made previously as to why Tirillo does not teach those elements. Furthermore, Applicants emphasize that the taco shells taught by Tirillo are not nestable. The verticality (see Fig. 3) would clearly not allow nesting without breakage of the taco walls. Further, the rectangular end barrier portion (callout 14 in Fig. 2) would prevent nesting of shells if one were motivated to stack the shells in other than a random manner (a "pile" in the Examiner's words). (Applicants mention in passing that there is no teaching of attempting to stack (or nest) multiple shells in the first instance.) And furthermore, the shape of the shells is clearly not substantially triangular, now an element of Applicants' claims.

Because Tirillo does not describe a plurality of substantially triangular, nestable snack pieces, Applicants request the withdrawal of the Section 102 rejection of Claims 1-4, 9 and 12 over Tirillo.

5. Claims 1-4, 9 and 17 (and cancelled Claim 22) stand rejected under 35 U.S.C. § 102(b) as being anticipated by **Kahn** (U.S. Design Patent No. D382,385). This is the first time Kahn has been cited as a Section 102 reference. In addition to asserting that the other elements of the rejected claims are taught by Kahn, the Examiner states "[r]egarding 'stackable', this was an inherent property of the Kahn et al product because it certainly was capable of being stacked, for instance in a random pile." For the reasons discussed with respect to Hreschak, Kahn clearly does not describe a snack piece that is nestable with other such pieces.

Applicants request the withdrawal of the Section 102(b) rejection of Claims 1-4, 9 and 17 over Kahn.

#### 35 U.S.C. § 103 Rejection

The Examiner sets forth rejections of certain claims over 35 USC § 103, using Hreschak as the primary reference in each instance. Before addressing those rejections, Applicants note that pending Claims 1-4, 9, 12-13 and 16-17 were not rejected under Section 103 in the prior rejection. As the claims have been further amended to obviate the Section 102 rejections, it follows that those claims are still deemed unobvious. As such, Applicants request withdrawal of the rejection of Claims 1-4, 9, 12-13 and 16-17 over Section 103.

With respect to the obviousness rejections of the remaining claims, the Examiner relies on Hreschak as the primary reference in each case, and several secondary references. As discussed, Hreschak teaches neither the nestability nor the substantially triangular shape aspects of the claims. Applicants submit that for the reasons set forth below, the secondary references do not cure the short-comings of Hreschak.

1. Claims 10-11 and 15 are rejected over **Hreschak** in view of **Fritos Scoops Corn Chips**.

Applicants submit that even if motivated to combine the references' teachings (which the Examiner has not supported in any manner and which Applicants submit is not present), the Scoops product does not teach either the nestability or substantially triangular shape elements of Claim 1, from which Claims 10, 11 and 15 depend. Furthermore, no attribute of the Scoops product suggests the snack piece length aspect (about 30 mm to about 110 mm) of Claim 10, the radius of curvature aspect (about 15 mm to about 500 mm) of Claim 11 or the open end width aspect (about 15 mm to about 75 mm) of Claim 15. As such, the obviousness rejection should be withdrawn.

2. Claims 6-7 and 23 (and cancelled Claim 5) stand rejected under 35 U.S.C. § 103(a) as being unpatentable over **Hreschak** in view of **Blish** [U.S. Design Patent No. D166,524].

Applicants submit that the combination of Hreschak and Blish in the first instance is improper. Hreschak is directed to a snack product, while Blish is directed to an edible container. One would not have been motivated, in the absence of Applicants' application, to combine the references' teachings in the first instance. The rejection is improper for this reason alone.

Furthermore, even if one were to combine the teachings, there is no suggestion of taking specific aspects of Blish (triangularity) and certain aspects of Hreschak to satisfy all the elements of Applicants' claims. Applicants respectfully request withdrawal of the rejection of Claims 6-7 and 23 over Hreschak in view of Blish.

3. Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over **Hreschak** in view of US Design Patent 300,199 to **Ipema**.

Ipema is directed to a design for a shovel. There is no motivation, even with the benefit of hindsight, to combine the disclosure of Ipema with that of Hreschak. And even if combined, Applicants' claimed attributes of nestability and substantial triangularity are not taught by the combination. Withdrawal of the obviousness rejection is requested.

4. Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over **Hreschak** in view of **Bierschenk**.

As with the combinations used by the Examiner with respect to the other claims, there is no motivation in Hreschak nor Bierschenk to combine the references' teachings in such a way as to arrive at the snack pieces within Applicants' Claim 1. Furthermore, even if one picks and chooses with the benefit of hindsight, to the extent Bierschenk discloses a triangular chip, the reference provides that for curved chips, "it will be curved about a line or axis of curvature 20"

(referring to Fig. 1). When referring to Fig. 1, it is seen that line of curvature 20 is parallel to edge B. In complete contrast, Applicants' Claim 1 (and therefore dependent Claim 8) provides that the claimed snack pieces have "a body curved about a first axis...wherein said first axis is *not parallel* to a side of said body..." Thus, even by picking and choosing between the cited references' teachings, one does not arrive at all the elements of Applicants' claims. No prima facie case of obviousness has been established.

Applicants therefore request the withdrawal of the Section 103 rejection over Hreschak in view of Bierschenk.

**SUMMARY**

Applicants proposed amendments to the claims obviate the Section 112, Section 102 and Section 103 rejections set forth in the January 7, 2005 Office Action. Applicants request entry of those amendments and respectfully request allowance of pending Claims 1-4, 6-13, 15-18, and 23.

Respectfully submitted,

STEPHEN ZIMMERMAN, ET AL.

By: Carl J. Roof  
Carl J. Roof  
Attorney for Applicant(s)  
Registration No. 37,708  
(513) 983-1246

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